THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2020 TERM
CASE NO. 2020-0536

PETITION OF WHITMAN OPERATING CO., LLC
D/B/A CAMP WALT WHITMAN & a.

REPLY BRIEF OF WICOSUTA OPERATING CO., LLC D/B/A CAMP WICOSUTA, WHITMAN OPERATING CO., LLC D/B/A CAMP WALT WHITMAN, AND WINAUKEE OPERATING CO., LLC D/B/A CAMP WINAUKEE, PETITIONERS-APPELLANTS

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(Oral Argument)
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490:4 Jurisdiction.

The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, including the authority to approve rules of court and prescribe and administer canons of ethics with respect to such courts, shall have exclusive authority to issue writs of error, and may issue writs of certiorari, prohibition, habeas corpus, and all other writs and processes to other courts, to corporations and to individuals, and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts.

Source. RS 171:2, 3. CS 181:5, 6. 1855, 1659:1, 10. 1859, 2211:3. GS 189:1. GL 208:1. 1885, 42:1. PS 204:2. 1901, 78:7. PL 315:2. RL 369:2. RSA 490:4. 1971, 341:1, eff. Aug. 24, 1971.

Argument

I. State Action by the Executive Branch Against Private Parties Must Be Subject to Judicial Review.

The New Hampshire Governor's Office for Emergency Relief and Recovery ("GOFERR") suggests in its opposition brief that it may act with legal impunity—and without any avenue for Petitioners to appeal decisions made specifically as to them. GOFERR's basis for this assertion is ironically the fact that GOFERR itself *failed* to afford Petitioners judicial or "quasi-judicial" process, such as notice or the opportunity to be heard.

Other than a handful of references to Supreme Court Rules that *contemplate* certain types of records on appeal, the State relies on *out-of-state* decisions to support its radical proposal to curtail this Court's jurisdiction under RSA 490:4 and Rule 10. *See* SB at 18-20.[1] The State's only relevant citation to a New Hampshire decision states: "*One object* of RSA 490:4 is to prevent and correct errors and abuses of courts of inferior jurisdiction." *Melton v. Personnel Comm'n*, 119 N.H. 272, 277 (1979) (emphasis added). The statute contemplates *other* objects, as well, including issuing writs of certiorari and other writs "to other courts, to corporations and to officials." RSA 490:4.

[1] "SB" refers to the Brief for the New Hampshire Governor's Office for Emergency Relief and Recovery.

The *Melton* decision confirmed this Court's certiorari jurisdiction in an appeal from the Personnel Commission, notwithstanding the *express inapplicability of RSA 541* to the petitioner.[2] This Court held that determining whether an administrative action is reasonable, "is a question of law which the plaintiff is entitled to have judicially determined. Individual rights should not be overridden without judicial review." *Melton*, 119 N.H. at 276–77 (quotation and parentheses omitted). Critically, the Court also made clear that such individual rights include those of "corporation[s]." *Id.* at 277.

Contrary to the State's extraordinary position that the *reasonableness* of GOFERR's actions is not reviewable by this Court under RSA 490:4 and Rule 10,[3] the *Melton* Court confirmed that, "[i]n order to allow challenges of decisions that would otherwise escape review, . . . standing to petition for certiorari should be liberally granted to any party [w]hose rights may be directly affected by the decision of a lower tribunal." *Id.* Although the *Melton* Court employed the term "tribunal" while describing its power to review "adjudicatory decisions of commissions and administrative agencies," *id.* at 276, this term is not dispositive. To restrict this Court's certiorari jurisdiction based on this terminology would contradict the Court's clear instructions that

[2] Since GOFERR has no organic statute, no such express limitation exists here.
[3] The State's suggestion that this case be limited to its Constitutional challenges, brought in Superior Court, is an inadequate end-run around this Court's clear jurisdiction to review agency action.

its "power . . . does not depend upon, and is not limited by, technical accuracy of designation of legal forms of action." *Id.* at 277.

The State's reading of Rule 10 would effectively read the words "writs of certiorari" out of RSA 490:4 altogether and instead limit the Court's jurisdiction to a review of errors by inferior courts. This Court should reject the invitation, and instead follow its own precedent of "liberally grant[ing]" the right of petitioners harmed by executive action—including actions by *administrative agencies*—to petition this Court via RSA 490:4 and Rule 10. *Id.*

II. Corporations Are Citizens Separate and Apart from their Owners, and the State Erred as a Matter of Law in Considering the Owners' Personal Finances.

The State seeks to bypass a fundamental basis for Petitioners' appeal—Petitioners' corporate personhood—by dismissing *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), as a First Amendment case with no relevance here. In so doing, the State rejects not only a core principle of Petitioners' argument but also a core principle of modern jurisprudence: corporations should be treated on equal footing as "natural persons."

This State embraces the principle of corporate personhood, separate from individual owners. *See, e.g.*, *LaMontagne Builders, Inc. v. Bowman Brook Purchase Grp.*, 150 N.H. 270, 275 (2003) (describing limited liability of owners as one of the "desirable and legitimate attributes of the corporate form of

doing business"). Pursuant to *Citizens United*, Petitioners' applications for a program intended to benefit *businesses* (and specifically those businesses, like Petitioners, that fell through the "GAP" of not having previously received a prior round of funding for *businesses*) cannot be rejected based on looking past the business and considering the personal finances of its individual owners, so as to then arbitrarily determine—without any objective or published criteria—that they are "too wealthy" for Petitioners to qualify for GAP funding.

The principle of *Citizens United* is not limited to the First Amendment context, and in fact, requires this Court to consider Petitioners' claims based on the unique harms the State's action imposed on them *as corporate entities*. To do so *outside* the First Amendment context accords with centuries of law. Long before *Citizens United*, the Supreme Court observed that, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 687 (1978).[4]

The State is similarly dismissive of the concept of "piercing the corporate veil" but this legal concept illustrates the narrow circumstances

[4] One such context lies with Petitioners' constitutional claims here. Both the majority and dissenting opinion in *Citizens United* cited approvingly to *First National Bank of Boston v. Bellotti*, in which the Court observed: "It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

under which the corporate form can be disregarded, and a corporation's *individual owners* can stand in for the corporation itself. These circumstances are limited to when an owner "suppresses the fact of incorporation, misleads his creditors as to the corporate assets, or otherwise uses the corporate entity to promote injustice or fraud." *Druding v. Allen*, 122 N.H. 823, 827 (1982). Absent such extraordinary or fraudulent circumstances, an individual owner's finances may not stand in for those of the corporation. *See, e.g.*, *Martinez v. Petrenko*, 792 F.3d 173, 183 (1st Cir. 2015) (collecting New Hampshire cases). While the State believes this concept to be inapplicable here since GOFERR did not "assess liability against the individual owners," SB at 31, the effect was the same and equally damaging: the loss of GAP funding, expressly intended to help cover the operating losses of *businesses* due to COVID-19 related measures, based solely on the financial position of its *individual* owners.

GOFERR committed an error of law reviewable by this Court when it disregarded the corporate identity and personhood of Petitioners and instead applied the personal finances of its individual owners to exclude Petitioners from GAP funding for which they were clearly eligible. As discussed below, this error was one of several ways in which Petitioners, as corporations, were treated arbitrarily, and indeed unfairly, throughout the application process.

III. The State Acted Arbitrarily, and Unreasonably, in Disregarding the Corporate Entity and Substituting the Financial Position of Owners.

In determining that the Petitioners' owners should be expected to contribute capital, the State takes a position not only contrary to the law, but also arbitrary and capricious, and unjust and unreasonable, under Rule 10.

The State's determination entirely disregards the Petitioners' business reality: loss of virtually all revenue while continuing to incur fixed expenses. Further, the finances of the individual owners has no rational bearing on Petitioners for two reasons. *First*, nearly all the individual owners of Petitioners are no more than passive stakeholders, uninvolved in the day-to-day operations of the business, and no legal or equitable principle compels owners of a corporate entity to cover the Petitioners' COVID-19 related operating losses. In many cases, their *direct* involvement in other businesses more critical to their personal well-being involved extraordinary time, attention, and financial losses. *Second*, Petitioners are among a group of several camps run by the parent corporation, all of which suffered huge losses due to COVID-19. In this case, ownership of multiple camps meant the individual owners had *less* capacity to inject capital into Petitioners, not more.

The State offers little *substantive* explanation for why its denial of GAP Fund grants to Petitioners should be upheld by this Court. It merely claims

that it had the discretion to exclude Petitioners from a grant expressly designated for *businesses* operating in the State, since it "rationally determined that businesses owned by extremely wealthy individuals with high levels of liquid assets and/or the ability to obtain private financing have the ability to survive the pandemic without the assistance of tax-payer-funded grants from the government." SB at 31. Yet even this explanation belies the legal error of substituting a corporate entity's *owners* for that of the corporation itself. The State fails to provide any rational explanation for how the finances of minority owners impacts the financial circumstances of Petitioners. Accordingly, the State's baseless disregard for the corporate form of Petitioners is an error of law which was both arbitrary and capricious, and unjust and unreasonable.

This Court's power to review agency action rests on fundamental notions of fairness—similar to the principles animating procedural and substantive due process, but without the same procedural foot faults associated with due process (e.g., protected property interests). What occurred in this case should offend any sense of fairness—particularly given the State's extensive efforts to escape judicial review. The State's references to minority shareholders' "extreme wealth" are irrelevant to *Petitioners'* eligibility as *businesses* organized as corporate entities and, since the State offers no explanation for how much wealth is "too extreme," arbitrary. The GAP Fund

was not a "tax-payer funded grant[] from the government" intended to fund the poor. SB at 15. Rather, it was intended to benefit *businesses* operating in the State—and, in particular, businesses (like Petitioners) who were unable to secure earlier rounds of state funding, yet suffered huge financial losses.

Specifically, GOFERR's GAP Fund rules were targeted toward businesses which were "impacted by the COVID-19 pandemic, but that have been unable to access support from other existing state and federal programs." Brief Appx. BA-004–BA-005. These "*other state (and federal) grants*," and not any source of personal wealth, was the clearly stated source of "other resources" which GOFERR's own rules referenced. *Compare id.*, *with S*B at 11. Rather than seeking to "replace all lost revenue due to COVID-19," SB at 31, Petitioners are asking for the same *business* grant its competitors received.

Among other things, the GAP Fund loosened, or eliminated entirely, criteria regarding state residency and gross revenues. It was entirely reasonable for Petitioners to believe, after being rejected from the first round of business grant funds, that they would be eligible for the GAP Fund since, as the State concedes, they "me[t] the eligibility criteria to apply for GAP funding." SB at

15.[5] The State dismissively refers to Petitioners' reliance on "a two-page screenshot from GOFERR's website," SB at 26, but that website was, for all intents and purposes, the "statute" and "regulations"—and certainly the only rules—relevant to the grant. The State can point to no other materials to the contrary. And *even if* this Court were to accept the State's displacement of Petitioners, its rejection of their *owners* as "too wealthy," based on an undisclosed—and unappealable—line-drawing, was fundamentally unfair.

IV. The State Violated Petitioners' Rights to Due Process and Equal Protection.

The State fails to address Petitioners' contention that GOFERR's actions were not only arbitrary but also conscience-shocking, in violation of Petitioners' *substantive* due process rights. As to *procedural* due process, the State concedes it "did not provide Petitioners notice and an opportunity for a hearing"—in other words, it afforded them essentially no due process. SB at 21. Instead, the State argues that *both* inquiries are cut off entirely because Petitioners do not have a protected property interest in GAP funding. The State bases much of its analysis on a Fifth Circuit opinion, *Ridgely v. FEMA*,

[5] Because the GAP Fund expanded eligibility to businesses that *either* "have its principal place of business" in New Hampshire *or* "conduct a significant portion of its operation" in the State, the State's statement that Petitioners' "principal business location is not in New Hampshire" is not only inaccurate but also irrelevant. SB at 11. In fact, Petitioners' "principal business location" *is* in this State: they operate three historic camps in New Hampshire, two of which have been in this state for over 100 years, employ New Hampshire residents every summer, bring joy to countless more children, and are believed to be the largest taxpayers in two out of three towns in which they operate.

512 F.3d 727 (5th Cir. 2008), which held that plaintiffs did not have a protected property interest in emergency rental assistance because the relevant federal statute and its implementing regulations, written in "entirely permissive terms," provided only that FEMA "*may* provide assistance" under certain conditions, which did not amount to a "substantive limitation[] on official discretion." *Ridgely*, 512 F.3d at 735, 736 (emphasis in original). GOFERR can point to no such "permissive" language in its own "implementing regulations" which, in this case, are limited to its own rules posted on its website.

GOFERR attempts to sidestep this issue by focusing instead on the CARES Act and related guidance issued by the U.S. Department of the Treasury. *See* SB at 26. However, the Department's provision for "reasonable judgment" in determining whether expenditures are "necessary" does not give GOFERR permission to set eligibility criteria, use the term "non-exclusive," and then disqualify otherwise eligible applicants based on a legally erroneous (and unpublished) criterion: an undefined level of *owners'* personal wealth.

Further, as described above, the only relevant guidance available to *applicants* was the GAP Fund website and eligibility factors published by GOFERR. The CARES Act's instruction to provide business grants to "reimburse the costs of business interruption caused by required closures," SB at 10, makes Petitioners *more* eligible, not less. The GOFERR eligibility factors

were specific, concrete and objective, and they mirrored the stated purpose of the grant program: to fund businesses who had fallen through the "GAP" of not having received a prior round of state business grants. *Cf. Ressler v. Pierce*, 692 F.2d 1212, 1215, 1216 (9th Cir. 1982) (recognizing that applicants for Section 8 benefits were entitled to due process protection, notwithstanding HUD's ability to "exercise discretion in the selection process," due in part to the program's clearly defined "eligibility standards" and "by virtue of [applicants'] membership in a class of individuals whom the . . . program was intended to benefit"). Petitioners dutifully followed those guidelines with a concrete, and reasonable, expectation of funding—informed by the undisputed fact that they met all published eligibility criteria.[6] Importantly, their expectation was derived from "existing rules or understandings that stem from an independent source such as state law"—in this case, GOFERR's own website. *In re. Union Telephone Company*, 160 N.H. 309, 322 (2010).

Finally, the State dismisses Petitioners' equal protection argument as "hypothetical," and tied only to *Petitioners'* corporate form, rather than to the

[6] The State suggests that the mere receipt of personal financial statements, along with their mention in a webinar, put Petitioners on notice of the undisclosed wealth criterion. Contrary to the State's representation, Petitioners do not claim they were "unaware that the State would consider" this information, SB at 12. Indeed, there are many reasons to consider personal financial information, including the prevention of fraud and/or duplication of grant awards. But nowhere in any of the materials GOFERR points to is owners' financial capacity identified as an additional *eligibility factor*.

State's actions. The State posits that, since it treated all applicants alike—by considering whatever personal financial statements were submitted by their publicly identified "owners"—there can be no equal-protection claim. This response is insufficient on at least two grounds.

First, the State fails to identify any criteria it applied to determine when and how the wealth of individual owners makes a *business* applicant too "wealthy" to be eligible for GAP funding. Petitioners are forced to take the State's word that it truly applied the personal financial statements of individual owners in a uniform way, based on a conclusory denial. *See* SB at 29. In fact, similarly situated competitors, including camps with "wealthy" owners and/or multiple camps, received emergency grants in the hundreds of thousands of dollars, *see* Brief Appx. BA-060, BA-061, while Petitioners did not.

Second, the State ignores the practical impact of its decision to treat these statements as an excluding factor—and the unique prejudice this decision caused Petitioners (who are organized as subsidiaries of a parent corporation, which in turn is closely held by a relatively large number of individual owners) as compared to differently structured camps in the State. The State failed to take into account that individual ownership of multiple camps meant that such obligations, if any, would necessarily be multiplied.

Whether viewed as an equal-protection or due process violation, or as an arbitrary and capricious (or unjust and unreasonable) agency decision, this fatal decision by GOFERR, as to Petitioners, must be reversed by this Court.

Conclusion

As an agency of State government, GOFERR's decisions and actions must be subject to judicial review. The GAP Fund's purpose was to administer and distribute CARES Act funds to *businesses* in New Hampshire; it was not established as a relief program to distribute federal dollars to the poor and indigent. GOFERR therefore erred as a matter of law by ignoring the corporate personhood of Petitioners as *businesses* and rejecting their otherwise qualifying GAP Fund application based solely on the supposed "extreme wealth" of owners, an undefined—and unappealable—criterion. This legally erroneous decision was arbitrary and capricious, and unjust and unreasonable. Accordingly, this Court must reverse GOFERR's decision and order it to award GAP funding to Petitioners consistent with other qualifying applicants.

Word Count Certification

I hereby certify that the foregoing brief complies with New Hampshire Supreme Court Rules 16(11) and 26(7) and contains 2,995 words, excluding the cover page, Table of Contents, Table of Authorities, and Text of Relevant Authorities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I am filing this document through the Court's electronic filing system pursuant to the Court's Supplemental Rules for Electronic Filing.

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